

No. 83-1471

Office - Supreme Court, U.S.

FILED

MAR 12 1984

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM W. WIRTZ, individually and as trustee, ARTHUR M.
WIRTZ, individually and as trustee, ST. LOUIS ARENA
CORPORATION, a corporation, ARENA BOWL, INC., a cor-
poration, and WIRTZ CORPORATION, a corporation,

Petitioners,

vs.

SUSAN MARY NORRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

EDWARD J. ROSS
153 E. 53rd Street
New York, New York 10022
(212) 888-0800
Attorney for Respondent

March 8, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Where the executor of a decedent's estate sells stock owned by the estate to corporations owned and controlled by him and his father, and he obtains the prior written approval of such sales from the beneficiary of the estate to whom such stock was bequeathed in trust, through fraudulent misrepresentations and omissions of material facts as to the value of such stock, can such beneficiary be deemed a seller of such stock, with standing to sue under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder?

2. Where a will requires the prior approval of the beneficiary of a trust before the trustee can purchase stock owned by the trust, is such approval required where the trustee, in his capacity as executor, sells such stock before the trust is established, and the sales are made to closely-held corporations owned by him and his father, rather than to himself personally?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Statement of the Case	1
The Opinions Below	3
Reasons for Denying the Petition.....	4
(1) Susan Norris has standing to sue.....	4
(2) The Norris will required Susan Norris' approval of the sales	5
(3) The decision below is not contrary to, but is in accord with, <i>Santa Fe Industries</i> and <i>Blue Chip Stamps</i>	7
(4) The existence of a state remedy is not a bar to a Rule 10b-5 case.....	8
Conclusion	9

TABLE OF AUTHORITIES

	PAGE
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	7, 8
Butner v. United States, 440 U.S. 48, 51, 58 (1979)	9
James v. Gerber Products Co., 483 F.2d 944, 948 (6th Cir. 1973)	4, 5
Kirshner v. United States, 603 F.2d 234, 240-41 (2d Cir. 1978), <i>cert. denied</i> , 442 U.S. 909 (1979)	5
O'Brien v. Continental Illinois Bank & Trust Co., 593 F.2d 54 (7th Cir. 1979)	5
Pappas v. Moss, 393 F.2d 865, 869 (3d Cir. 1968)	6-7
Rekant v. Dessler, 425 F.2d 872, 880, 882 (5th Cir. 1970)	7
Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977)	7, 8
Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381 (2d Cir. 1974), <i>cert. denied</i> , 421 U.S. 976 (1975)	6
SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191, 198 (1963)	6
Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971)	8
Travis v. Anthes Imperial Ltd., 473 F.2d 515, 527 (8th Cir. 1973)	7

No. 83-1471

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WILLIAM W. WIRTZ, individually and as trustee, ARTHUR M.
WIRTZ, individually and as trustee, ST. LOUIS ARENA
CORPORATION, a corporation, ARENA BOWL, INC., a cor-
poration, and WIRTZ CORPORATION, a corporation,

Petitioners,

vs.

SUSAN MARY NORRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

Respondent Susan Mary Norris ("Susan Norris"), the daughter of James Norris, deceased, is the beneficiary of the Estate of James Norris (the "Norris estate") and of a trust established by his will. Petitioner William W. Wirtz is the executor of the Norris estate and sole trustee of said trust.

The Norris estate owned at least 49% of the stock of petitioners St. Louis Arena Corporation and Arena Bowl, Inc.

Petitioner Wirtz Corporation, owned by the two Wirtzes, purported to own 51% of the stock of these corporations. The Norris estate also owned a minority stock interest in Judge & Dolph, Ltd., of which the Wirtz Corporation owned 80% of the stock. When the sales were made, William Wirtz was the President and a director, and his father was Chairman of the Board of Directors, of each of the three corporations.

The will authorizes Wirtz, as trustee, to purchase stock owned by the trust for the benefit of Susan Norris "provided he has [her] approval . . . with respect to such purchase" (App. 85).

William Wirtz, as executor of the Norris estate and before funding said trust, sold the estate's stock in St. Louis Arena Corporation to that corporation and in Arena Bowl, Inc. to that corporation, so that the Wirtz Corporation became the sole owner of both corporations. Also, the Wirtz corporation directly purchased the estate's minority interest in Judge & Dolph, Ltd. As the Court of Appeals put it, "when the dealing was over, the Wirtzes effectively controlled all three of the closely-held corporations in which the estate had held stock and to that extent became more of a beneficiary under the will than did plaintiff, the decedent's daughter" (App. 5). Wirtz obtained Susan Norris' approval of the sales, just after she became 18 (App. 5), and without her being represented by counsel.

The complaint, which petitioners have omitted from the Appendix but which is summarized in the opinions of the District Court (App. 27-37) and the Court of Appeals (App. 3-6), avers that William Wirtz knew that the price paid to the estate for the stock was below its fair market value and that he "knowingly concealed the true value of the stock from plaintiff" (App. 31-32). The complaint further alleges that "[i]t was in the course of inducing her [Susan Norris'] uninformed approval of the sales that the defendants allegedly made the false statements substantially affecting the value and fair price of the stocks they were thereby acquiring." (App. 5-6). With

respect to Judge & Dolph, Ltd., the complaint alleges that Wirtz also falsely represented that such corporation was "to be liquidated and dissolved," implying that it was going out of business, although there was no such intention and, as the complaint further alleges, its business "is still owned and operated by the Wirtz family and is one of the largest wholesale liquor companies in the Chicago metropolitan area" (App. 35).

The complaint, which asserts claims under each of the three subdivisions of Rule 10b-5, avers that defendant "William Wirtz was engaged in a scheme to defraud, and did defraud Susan Norris, in violation of Section 10(b) of the 1934 Act and Rule 10b-5" (App. 32).

Petitioner moved to dismiss the complaint on the ground that Susan Norris lacked standing to sue under Rule 10b-5, since she was not a seller of the stock; that her prior approval of the sales was not required and that therefore she did not have an investment decision to make in connection with such sales. While Wirtz had deemed her approval to be required and obtained it through fraudulent misrepresentations and omissions, it is petitioners' position that the will required Susan Norris' approval only if Wirtz personally purchased the stock, and not where the purchase was made by close corporations owned by him and his father, and only if he, as a trustee, sold the stock to himself, and not if he, as an executor, sold the stock to himself.

The Opinions Below

The District Court, which dismissed the complaint, held that Susan Norris, as beneficiary, was affected by the sales made by her fiduciary and therefore has standing to sue under Rule 10b-5. However, it held that the will "does not require her approval" (App. 52), and interpreted the will as requiring her approval only if Wirtz personally purchased the stock and not where "the closely-held corporations were the purchasers" (App. 54). Accordingly, it held that "[s]ince plaintiff had no

voice in the decision to sell the stock in the three defendant corporations, any nondisclosure of material facts by defendants does not meet the 'in connection with a purchase or sale' requirement of Section 10(b) and Rule 10(b-5)" (App. 53).

The Court of Appeals, which reversed, unanimously held that "the plaintiff experienced the direct impact of the securities transactions, for she was the beneficiary of the trust involved" (App. 11). It stated that it would apply "a logical and flexible construction of the term 'purchaser-seller' in order to accommodate the avowed purpose of Sec. 10(b) of protecting the investing public and of ensuring honest dealings in securities transactions," quoting *James v. Gerber Products Co.*, 483 F.2d 944, 948 (6th Cir. 1973) (App. 11-12).

As to the interpretation of the special language in the Norris will, two panel members held that the approval provisions applied whether Wirtz made the sale as executor or as trustee, and whether he sold to himself personally or to close corporations owned by him and his father. The dissenting judge deemed the approval requirement limited to a sale by the trustee to himself personally.

Reasons for Denying the Petition

1. Susan Norris has Standing to Sue

This case presents neither special nor important reasons for grant of review. There is no conflict in circuits as to whether the beneficiary of an estate or trust has standing, as a seller, to sue under Rule 10b-5 where the fiduciary made the sales and fraud was used in connection therewith. The decision below is in accord with decisions in those circuits which have considered this question. Indeed, the petition does not suggest a conflict in circuits.

The District Court and the three judges of the Court of Appeals, all agreed that Susan Norris, as the beneficiary of the estate which made the sale, had standing to sue. The District Court held that she is the one "who would feel the impact if

any fraud occurred in the stock sales," and that as the "beneficiary of a residuary trust . . . , the sale of such assets for any unreasonably low price would *directly* affect the *plaintiff* . . . and not the seller, executor-trustee William Wirts" (italics in original text) (App. 43-44).

The Court of Appeals, reviewing cases in other circuits (*Kirshner v. United States*, 603 F.2d 234, 240-41 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), and *James v. Gerber Products Co.*, *supra*) (App. 12), stressed that "the plaintiff experienced the direct impact of the securities transaction, for she was the beneficiary of the trust involved" (App. 11). The dissenting judge agreed that Susan Norris had standing to sue, and as to this issue stated that "[t]he majority opinion is so persuasive that . . . I could have written it myself" (App. 18-19).

It is so clear that a beneficiary of an estate or trust has standing to sue under Rule 10b-5, that such issue lacks the significance required for grant of certiorari,—apart from the lack of a conflict in circuits.

2. The Norris Will Required Susan Norris' Approval of the Sales

The petition urges that the approval requirement in the Norris will applies only where stock is sold "*by the individual trustee*" and is "not applicable to sales from the estate by the co-executors" (Pet. 4-5) (Italics in original text). Though petitioners obtained Susan Norris' prior written approval, they claim that it was not really required and, accordingly, that she had no investment decision to make; that hence it was irrelevant whether Wirtz obtained her approval through fraudulent misrepresentations and omissions; and that this case is controlled by *O'Brien v. Continental Illinois Bank & Trust Co.*, 593 F.2d 54 (7th Cir. 1979), which the Court below erred in not following.

This is clearly a unique issue as to the interpretation of special language in the Norris will, which affects no one other

than the litigants in this case and which lacks the importance requisite to grant of certiorari.

Furthermore, the Court of Appeals was clearly correct when it held that "the purchases by the close corporations controlled by defendants William and Arthur Wirtz were in fact, or virtually, a purchase by defendant-trustee William Wirtz, so that plaintiff's prior approval of the sale was essential under the will," and that "the only reasonable interpretation of the testamentary provision is that it was intended to prevent any self-dealing transaction, regardless of the form, in which the individual trustee purchased securities beneficially owned by the plaintiff" (App. 60). It is hard to conceive of a court reaching a contrary conclusion.

Moreover, the issue as to the need for Susan Norris' approval is relevant only to her claim under subdivision (b) of Rule 10b-5, as to whether her approval was obtained through untrue statements or omissions of material fact. However, the complaint also alleges that the defendants' acquisition of all the stock owned by the estate in such three corporations, at a fraction of its true value, through the acts and procedures engaged in by the Wirtzes, constituted a scheme to defraud, violative of subdivision (a), and operated as a fraud and deceit upon Susan Norris, violative of subdivision (c). Establishing that Susan Norris' approval was obtained through fraudulent misrepresentations and omissions is not an element of her claims under subdivisions (a) and (c) of Rule 10b-5.

In *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 198 (1963), which arose under the Investment Advisers Act of 1940, which contains the same language as subdivision (c) of Rule 10b-5, this Court held that there is a "broad proscription against 'any . . . practice . . . which operates . . . as a fraud or deceit;'" that there was no need for a "specific proscription against nondisclosure;" and that a "general proscription against fraud" sufficed to state a claim. See also *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 381 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975); *Pappas v.*

Moss, 393 F.2d 865, 869 (3d Cir. 1968); *Rekant v. Desser*, 425 F.2d 872, 880, 882 (5th Cir. 1970); and *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 527 (8th Cir. 1973).

3. The Decision Below is not Contrary to, But is in Accord With, *Santa Fe Industries and Blue Chips Stamps*

The petition urges that "[t]he appellate court's decision directly conflicts with" *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Pet. 7). *Santa Fe Industries* did not involve a sale of stock, but a short-form merger under Delaware law, the requirements of which were fully satisfied. This Court there noted that "the complaint did not allege a material misrepresentation or non-disclosure with respect to the value of the stock" (430 U.S. at 469); that "the complaint failed to allege a material misrepresentation or material failure to disclose" (p. 474); that "there was no 'omission' or 'misstatement' in the information statement accompanying the notice of merger" (*id.*); and that "the transaction, if carried out as alleged in the complaint, was neither deceptive nor manipulative and therefore did not violate either § 10(b) of the Act or Rule 10b-5." (*id.*)

Santa Fe Industries made clear that a "claim of fraud and fiduciary breach . . . states a cause of action under . . . Rule 10b-5" where "the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute" (430 U.S. at 473-74). This Court's opinion noted that the many Court of Appeals cases which sustained a Rule 10b-5 complaint where there was fiduciary misconduct all "involved an element of deception as part of the fiduciary misconduct held to violate Rule 10b-5" (430 U.S. at 475 n.14). However, it held that there the "breach of fiduciary duty" did not violate § 10(b) and Rule 10b-5 only because it was committed "without any deception, misrepresentation, or non-disclosure" (430 U.S. at 476).

Here, in contrast, Wirtz's breach of fiduciary duty was accomplished through deception, misrepresentation and non-

disclosure. The Court of Appeals, after analyzing the complaint, held that "plaintiff has made sufficient allegations of deception by the defendants to satisfy the requirements for a Section 10(b) or Rule 10b-5 violation announced in *Santa Fe Industries*." (App. 8-9). *Santa Fe Industries* mandates the decision of the Court of Appeals.

In *Blue Chip Stamps*, the stock was "neither purchased nor sold", and "[t]he complaint alleged that class members because of and in reliance on the false and misleading prospectus failed to purchase" (421 U.S. at 725, 727). This Court simply held that a Rule 10b-5 case requires a sale or purchase, and could not be based on a decision not to sell, allegedly influenced by fraudulent misrepresentations and omissions. Here, of course, sales were made.

Petitioners' reliance on *Blue Chip Stamps* is another aspect of their erroneous position that Susan Norris is not a seller because the fiduciary made the sale.

4. The Existence of a State Remedy is Not a Bar to a Rule 10b-5 case

The petition urges error because Susan Norris has a remedy in the state court against the trustee for breach of fiduciary duty and illegal self-dealing (Pet. 9). This position has been foreclosed, at least since *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971), which states:

Section 10(b) must be read flexibly, not technically and restrictively. Since there was a "sale" of a security and since fraud was used "in connection with" it, there is redress under § 10(b), whatever might be available as a remedy under state law.

Petitioner's reference to Illinois law, as it applies to the construction of Illinois wills, and their contention that the Court of Appeals applied the wrong principles of Illinois law in interpreting the Norris will (Pet. 11), as a basis for obtaining

certiorari, is misplaced. This Court does not grant certiorari to decide whether a Court of Appeals correctly applied state law. Even where it grants certiorari, it will "decline to review the state-law question" since "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *See Butner v. United States*, 440 U.S. 48, 51, 58 (1979).

Conclusion

It is respectfully submitted that this petition does not meet any of this Court's criteria or standards for exercising its discretion to grant certiorari; that the Court of Appeals decision is correct in all respects; and that certiorari should be denied.

Respectfully submitted

EDWARD J. ROSS,
153 East 53rd Street
New York, New York 10022
(212) 888-0800
Attorney for Respondent

March 8, 1984